United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

173

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

CEOLA COOKS,

Appellant,

v. No. 24,546

ROLAND V. FOWLER,
T/A J. EDWARD
FOWLER AND SON,

Appellee

APPEAL FROM THE DISTRICT OF

COLUMBIA COURT OF APPEALS

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TABLE OF CONTENTS

	Page
STATEMENT OF ISSUE PRESENTED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	
I. MECHANICAL PROCEDURE	6
II. THE STANDARDS FOR GRANTING A STAY PENDING APPEAL	8
III. FORMS OF RENTAL PAYMENTS ON CONDITIONED STAY ORDER	12
IV. THE TENANT SHOULD NOT BE REQUIRED TO PAY AN AMOUNT WHICH EXCEEDS THE DIMINISHED RENT AS IT BECAME DUE .	13
V. THE METHODS OF DETERMINING THE DIMINISHED VALUE OF THE PREMISES .	17
CONCLUSION	30

TABLE OF AUTHORITIES

		Page
	CASES:	
*	Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (1970)	16, 30
*	Bell v. Tsintolas Realty Co., ___ U.S. App. D.C. ___, 430 F.2d 474 (1970)	6, 12, 13
	Blanks v. Fowler, D.C. Cir. No. 24,548 (Nov. 13, 1970)	10, 11
*	Brown v. Southall Realty Co., 237 A.2d 834 (DCCA 1968), cert. denied, 393 U.S. 1018 (1969)	2, 15
	Capital Traction Co. v. Morgan, 44 App. D.C. 237 (1915)	28
	Clark v. Associated Retail Credit Men, 70 App. D.C. 183, 105 F.2d 62 (1939)	28
	Cooks v. Fowler, LT 19349-69 (1970)	2
	Cooks v. Fowler, LT 51880-70	2
*	Cooks v. Fowler, D.C. Cir. No. 24,546, slip opinion of November 13, 1970	10, 11, 15
*	Cooks v. Fowler, D.C. Cir. No. 24,546, supplemental opinion, January 12, 1971	15
	William J. Davis, Inc. v. Slade, 271 A.2d (DCCA 1970)	9, 15

* indicates authorities primarily relied upon

		Page
	CASES (cont'd.):	
	Discount Motor Sales, Inc. v. Shubrooks, 163 A.2d 818 (DCCA 1960)	22
	Dorfmann v. Boozer, 134 U.S. App. D.C. 272, 414 F.2d 1168 (1969)	11
*	Eastman Co. v. Southern Photo Co., 273 U.S. 359 (1927)	24
	Edwards v. Habib, 125 U.S. App. D.C. 49, 366 F.2d 628 (1965)	10, 11
	Gerber v. Columbia Palace Corp., 183 A.2d 398 (D.C. 1962)	26
	Glennon v. Travelers Indemnity Co., 91 A.2d 210 (D.C. 1952)	27
	Henkel v. Varner, 78 U.S. App. D.C. 197, 138 F.2d 934 (1943)	26
	Illinois Central R. Co. v. Crail, 281 U.S. 57 (1930)	22
*	Javins v. First National Realty Corp. ___, U.S. App. D.C. ___, 428 F.2d 1071, cert. denied, 39 U.S.L.W. 3224 (1970)	14, 15, 16, 17 18, 26, 27, 28
	Kenney v. Washington Properties, 76 U.S. App. D.C. 43, 128 F.2d 612 (1942)	26
	Lewis v. Firestone, 130 A.2d 317 (D.C. 1957)	26
	Manning v. Lamb, 89 A.2d 882, (D.C. 1952)	27
	Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970)	14

* indicates authorities primarily relied upon

	Page
CASES (cont'd):	
Meyers v. Antone, 227 A.2d 56 (DCCA 1967)	22
John R. Pinkett, Inc. v. Lomax LT 111726-69, et seq. (June 5, 1970)	29
Reste Realty Corp. v. Cooper 53 N.J. 444, 251 A.2d 268 (1969)	14
Robinson v. Diamond Housing Corp. D.C. Cir. No. 23,891 (Sept. 25, 1970)	10
Ruppert Real Estate, Inc. v. Clark LT 24156-70 (June 7, 1971)	29
Shea v. Fridley, 123 A.2d 358 (D.C. 1956)	27
South Potomac Realty Co. v. Adams LT 90210-70 et seq. (Dec. 22, 1970)	29
* Story Parchment Co. v. Paterson Co., 282 U.S. 555 (1931)	25, 26
Thorpe v. Thorpe, 124 U.S App. D.C. 299, 364 F.2d 692 (1966)	7
* Virginia Petroleum Jobbers Ass'n. v. FPC, 104 U.S. App D C. 106, 259 F.2d 921 (1958)	8
Waggaman v. Forstmann, 217 A.2d 310 (DCCA 1966)	26, 28, 29
Walsh v. Schafer, 61 A.2d 716 (D.C. 1948)	27

* indicates authorities primarily relied upon

Page

CASES (Cont'd):

Washington Hospital Center v. Butler, 127 U.S App. D.C. 379, 384 F.2d 331 (1967) 26

Talley v. Campbell Music Co., 219 A.2d 852 (DCCA 1966) 22

RULES OF COURT:

Fed. R. App. P. 8(a) 6

OTHER AUTHORITIES:

25 C.J.S. Damages § 64 (1966) 28

2 Jones on Evidence (1958 ed.) § 403 20

Corbin on Contracts (1951 ed.) § 1002 Compensatory Damages 18

McCormick, Damages (1935) § 27. 26

Model Residential Landlord - Tenant Code (Tent. Draft 1969) American Bar Foundation 16

Williston on Contracts (3rd ed.) § 1393A 28

REFERENCES TO RULINGS:

1) Order of July 27m 1970 (Hyde J.) staying execution of judgment for eviction on condition that defendant deposit rent

2) Order of District of Columbia Court of Appeals denying motion for stay of order to deposit rent, filed August 13, 1970.

STATEMENT OF THE ISSUE PRESENTED

Did the trial court err as a matter of law in the procedures and standards under which it conditioned appellant's stay of eviction pending appeal upon the payment of her full contractual rental amount into court?

This case has previously been before this Court on the following occasions:

1. Motion for Emergency Stay, granted, Order of August 17, 1970 (Robinson & Robb, JJ.).
2. Petition for Allowance of Appeal, granted, Order and Opinion of November 13, 1970 (Robinson, J.; Fahy & Robb, JJ.).
3. Supplemental Opinion of January 12, 1971 (Fahy, Robinson & Robb, JJ.).

STATEMENT OF THE CASE

Appellant, Mrs. Ceola Cooks, resides with her three children as a tenant in Apartment 41 at 1621 Twelfth Street, N.W. Appellee, Roland A. Fowler, at the time of the trial in this case, was the rental agent of this property for its owner, Mrs. Goldie Goldberg. In February 1969, Fowler sued Mrs. Cooks for possession of her apartment based on her alleged nonpayment of rent. LT 19349-69. Mrs. Cooks defended this action asserting that housing code violations precluded her landlord's claim. Prior to the trial in this nonpayment case, Fowler again sued Mrs. Cooks, this time based upon the expiration of a notice to Mrs. Cooks to quit the premises. LT 51880-70. In her answer and jury demand to this action, Mrs. Cooks asserted, inter alia, that this second suit was in retaliation for her reliance on a defense based on housing code violations in the first.

Over Mrs. Cooks' objection, these two suits were consolidated for jury trial. In the nonpayment case, trial Judge Hyde permitted the jury to decide whether the parties' lease had been voided at its inception due to the existence of serious housing code violations at the lease-hold's commencement. See Brown v. Southall Realty Co.,

237 A.2d 834 (D.C.C.A. 1968), cert. denied, 393 U.S. 1018 (1969). In this action, the jury returned a verdict for Mrs. Cooks, finding that the lease was voided from its inception due to the conditions of Mrs. Cooks' apartment. 1/

In the second suit, the trial judge permitted the jury to determine whether the action was brought in retaliation for Mrs. Cooks' reports of housing code violations to governmental authorities. He refused, however, to allow Mrs. Cooks to assert the defense that this second suit was brought in retaliation for her reliance upon the housing code in the first suit. 2/ The jury returned a judgment for possession for Fowler in this action.

Following trial, Mrs. Cooks moved for a stay of this judgment for possession in order that she might

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1/ The judge directed a verdict for the landlord, however, regarding Mrs. Cooks' secondary claim: that the value of the property was diminished due to substantial housing code violations, and accordingly she was entitled to a set-off. See Javins v. First Nat'l Realty Corp., ____ U.S. App. D.C. ____, 428 F.2d 1071, cert. denied, 39 U.S.L.W. 3224 (1970). An explanation of this ruling is contained in Judge Hyde's memorandum lodged with this Court (p. 14).

2/ See lodged jury instructions given by Judge Hyde regarding retaliation (pp. 15-18).

take an appeal. Judge Hyde, in chambers and without a set of findings, granted the requested stay, but conditioned it upon Mrs. Cooks paying her full monthly rental as stated in her just-voided lease, $72.50, into the trial court's registry at the commencement of each month.[3/] Viewing this condition as improper, Mrs. Cooks appealed this order to the District of Columbia of Appeals (DCCA) requesting a stay of the order's effect and its summary reversal. These motions were denied without stated reasons and the instant appeal to this Court followed. See Cooks v. Fowler, D.C. Cir. No. 24,546, slip opinion of Nov. 13, 1970.

SUMMARY OF ARGUMENT

Appellant contests in this appeal the trial court's conditioning of her stay pending appeal upon her payment into court of the full rental amount for which she originally contracted. Appellant acknowledges the correctness of the trial court's order in several respects:

3/ See lodged Clerk's jacket entry (p. 1).

it did grant a stay of eviction; its condition of rental payments was limited to future monthly amounts; and these amounts were made payable into the trial court registry rather than directly to appellee. Appellant insists, however, that the trial court must also, upon request, hold a hearing to determine the appropriate conditions of the stay and permit both parties to offer evidence in support of their positions. If requested, findings should accompany the court's order.

Appellant's most serious difficulty with the order being appealed from is that it required her to pay into court the full amount of rent set forth in her lease even though her lease was void due to the existence of substantial housing code violations in her apartment. Because these housing deficiencies constituted a breach of the landlord's warranty of habitability, thereby precluding the landlord from being entitled to the full rental amount, the condition on appellant's stay required her to pay an amount greater than her reasonable rent. Appellant asserts that it was error to require her to file security in an amount greater than the rental sum to which her landlord might ultimately be entitled.

For these reasons, appellant seeks reversal of the lower court order and a remand to the trial court for the entry of an appropriate order.

ARGUMENT

I. MECHANICAL PROCEDURES

The mechanical procedures which trigger a stay pending appeal should be the filing of a motion for this relief and a subsequent hearing, if requested, on the motion. This motion should first be presented to the trial court.[4/] The party opposing the stay should be given ample time to respond and prepare for the hearing. Cf. Bell v. Tsintolas Realty Co., ___ U.S. App. D.C. _____, 430 F.2d 474, 479 (1970).

The hearing on the motion should be so structured as to permit the introduction of relevant evidence going to the issue of whether a stay should be granted and, if so, what its terms should be. The extent and form of evidentiary proof should depend on the proffers of proof made by counsel and the needs of the particular case. In some instances a minimum of proof may be needed if the trial judge has already been exposed to the relevant facts at a just-completed trial. In some cases the parties may

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4/ See Fed. R. App. P. 8(a).

be satisfied, and the court may be sufficiently informed, if only affidavits and documentary evidence are filed with the court and oral argument of counsel is had. In other instances, oral testimony and cross-examination may be necessary for a just resolution of the motion. The nature of the hearing must surely be tailored to the characteristics of the particular case. But it must be made clear that the trial court will often be required to decide the motion on the basis of exceedingly complex information. A ruling on the basis of submitted legal memoranda will usually be inadequate. The parties should be encouraged to provide the court with as much relevant data as possible, and the court should be open and receptive in considering it.

To insure that a fair determination has been made, the trial court should, where requested by either counsel, file a statement of findings of fact and law that reflect his consideration and disposition. 5/ This would greatly facilitate any necessary appellate review, and, most importantly, give the parties a feeling that their claims have been dealt with in a just and thorough

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5/ Cf. Thorpe v. Thorpe, 124 U.S. App. D.C. 299, 302, 364 F.2d 692, 695 (1966).

manner. As the instant case makes strikingly clear, the lack of an ample record makes review very difficult.

II. THE STANDARDS FOR GRANTING A STAY PENDING APPEAL

The Virginia Jobbers criteria, which in this jurisdiction have traditionally been required to be met by an appellant who is seeking a stay pending appeal, consist of (1) a strong likelihood of success on the merits, (2) irreparable harm to the appellant absent a stay, (3) the lack of substantial harm to the appellee and other interested parties if a stay is granted, and (4) a finding that a stay would be in the public interest. Virginia Petroleum Jobbers Ass'n v. FPC, 104 U.S. App. D.C. 106, 110, 259 F.2d 921, 925 (1958).

Appellant contends that these generally applicable standards must be modified when applied to a residential tenant's appeal in the landlord and tenant context. As the controlling decisions of this Court seem to have recognized, the dictates of the unique landlord-tenant setting require some slight alteration to the rule regarding the issuance of stays.

The major factor influencing this necessary alteration is the usual circumstance that an eviction from

the premises, which would result absent a stay, will generally work an extreme and irreparable harm upon the tenant, especially upon a low-income tenant who is at the mercy of this city's extreme housing shortage.[6/] Without a stay the tenant's appeal would be rendered virtually meaningless. The pretrial status quo, once altered, is most difficult to restore after a reversal on appeal. Because of this extreme result absent a stay, stays of indigent residential tenants' evictions pending appeal should be virtually mandatory.

Appellant urges that this Court, in recognizing the extremely strong impact of one of the factors,--irreparable harm--compensate for this by reducing the requirement that an appellant show substantial likelihood of success on the merits. Rather than require a showing of "substantial likelihood of success" on the merits, appellant urges that stays in the landlord and tenant context should automatically be granted, other factors being equal, when the appellant-tenant[7/] has demonstrated

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6/ The pressures of the low-income housing market have been recognized by the District of Columbia Court of Appeals, among others. See William J. Davis, Inc. v. Slade, DCCA No. 5329, slip opinion at 5-6 (Dec. 3, 1970).

7/ The landlord rarely finds himself in an appellant's role because he can generally gain quicker relief by commencing a second suit for possession with its summary proceedings and expedited calendar preference, than by the slower appeal route.

that he in good faith presents a nonfrivolous issue on appeal.[8/]

In the typical case, because the other Virginia Jobbers criteria are generally to be found in the landlord and tenant context, this determination should result in a finding that a stay of eviction is required.[9/] Barring extraordinary circumstances, "the public interest lies in keeping [the appellant's] family housed, at least until the courts can determine [appellant's] rights." Edwards v. Habib, 125 U.S. App. D.C. 49, 51, 366 F.2d

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8/ The required showing of possibility of success on the merits has never been specifically quantified by this court; but it is at least clear that it is something less than the Virginia Jobbers' "substantial indication of probable success." In granting the intermediate stay in this case the Court found this factor to have been satisfied because "the probabilities of [the appeal's] success cannot be hastily discounted." Cooks v. Fowler, D.C. Cir. No. 24,546, slip opinion at 7 (Nov. 13, 1970). In Blanks v. Fowler, D.C. Cir. No. 24,548 (Nov. 13, 1970), this Court employed an even more lenient standard: "Petitioner's chances of ultimate success, though perhaps not the best, are hardly the worst . . . ." Slip opinion at 4.

9/ Although the granting of some type of stay of eviction pending appeal has generally been the practice of courts in this jurisdiction, there have been noted exceptions. See, e.g., Robinson v. Diamond Housing Corp. No. 23,891, statement of Robinson, J., Sept. 25, 1970. This lack of certainty which confronts an appealing indigent tenant creates a great deal of insecurity and consequently presents a serious chilling effect on the tenant's willingness to exercise his right of appeal.

628, 630 (1965).[10] The balance of hardship between the parties will always be found to fall more heavily on the tenant. A landlord threatened with financial harm pending appeal has available a broad assortment of legal remedies. Most directly, he may sue the tenant for nonpayment of rent and recover whatever money may be found owing. District of Columbia law has furthermore provided various other forms of relief which can bring him security.[11] In situations where the landlord asserts his intent to remove the property from the rental market, his declaration seems to be an acknowledgement that he has no need for rental income. Accordingly, this landlord's hardship would be minimal. Thus, in all but the most unusual circumstances, the indigent tenant will show irreparable harm and great hardship while the landlord's hardship, if any, can be minimized by the court's setting appropriate conditions for the stay,[12] usually some form of "rental" payment by the tenant.

10/ See also Cooks v. Fowler, D.C. Cir. No. 24,546, slip opinion at 7 (Nov. 13, 1970) ("The public interest would hardly be served by adding petitioner and her family to the homeless."); Blanks v. Fowler, D.C. Cir. No. 24,548, slip opinion at 4 (Nov. 13, 1970).

11/ For a listing of these remedies, see Dorfmann v. Boozer, 134 U.S. App. D.C. 272, 275-76, 414 F.2d 1168, 1171-72 (1969).

12/ See Edwards v. Habib, supra, 125 U.S. App. D.C. at 51, 366 F.2d at 630.

III. FORM OF RENTAL PAYMENTS ON CONDITIONED STAY ORDER

In Bell v. Tsintolas Realty Co., supra, this court explains the significant difference between a landlord's suit for possession and his suit for unpaid rent. 430 F.2d at 477. A suit brought solely for possession, as in this appeal, "cannot legally eventuate in a judgment for rent." Id. at 480. This important characteristic was surely a significant factor in leading the Bell court to hold that protective orders requiring pretrial payments by a defendant-tenant in a suit for possession, must be paid into the registry of the court, rather than directly to the landlord. Id. at 483. This circumstance is unaltered when payments are made under a protective order accompanying a stay pending appeal.

The entry of a judgment for possession merely establishes that the landlord is legally entitled to possession of the premises. It does not entitle him to any unpaid rent for the period on which the suit is based. Pending appeal, the landlord is entitled only to security for his right to possession. A stay of eviction affects his right to possession only for a future period, for the duration of the appeal. The conditions placed upon any stay should therefore only concern this future period.

In the absence of litigation, the landlord's security during a period of occupancy consists of the rents he collects and his right to sue the tenant for any tenant-caused waste to his remainder interest. The "use and occupancy" bond, consisting of future payments of a fair rental amount, fully provides this security. The deposit of such an amount into court adequately secures the landlord's interests during the period of appeal. If he is fully successful on appeal, he can recover that amount from the court registry. Cf. Id. at 485.

Because the stay in Mrs. Cooks' case was conditioned upon deposits which were ordered paid into the court registry, rather than directly to the landlord, and because these amounts represented only future, rather than past and future payments, the trial judges resolution of these two valuables is not claimed as error by Mrs. Cooks.

IV. THE TENANT SHOULD NOT BE REQUIRED TO PAY AN AMOUNT WHICH EXCEEDS THE DIMINISHED RENT AS IT BECOMES DUE

The protective order disputed herein was issued pending the appeal of a jury finding for the landlord on his claim for possession due to a 30-day notice to quit, despite

the tenant's claim that the eviction was illegal because it was retaliatory in nature.[13/] The trial judge conditioned his stay upon Mrs. Cooks' payment of the full monthly rental under the voided lease agreement.

The court's protection of the landlord in lieu of his possession of the premises can properly secure the prospective rent he would be entitled to receive from the stay of eviction to final resolution of the dispute.[14/] The tenant should not be required to make payments which exceed the maximum amount the landlord could receive if he prevailed on appeal. In this case, with a jury finding for

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13/ The tenant prevailed on the claim for possession based on her alleged failure to pay rent. She sought to put to the jury the question of the reduced value of the premises due to a breach of the warranty of habitability implied in the lease under this Court's decision in Javins v. First Nat'l Realty Corp., supra. However, the court directed a verdict for the plaintiff landlord as to that claim finding that such a determination by the jury would be too speculative. It might be inferred from the jury's finding for the tenant on the rent claim that they would have found the premises so lacking in habitability as to abate the entire rental.

14/ In a New Jersey case for possession based on non-payment of rent, where the dispute concerned a tenant's attempt to set-off the amount she had paid a plumber, the court, in a case following Reste Realty Corp. v. Cooper, 53 N.J. 444, 251, A.2d 268 (1969), discusses apparently favorably a lower court's granting of a stay pending appeal conditioned on the tenant's payment of rent as it came due, except for the disputed rent. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

the tenant that substantial housing code violations existed and with no evidence of correction of these violations up to the time of the stay, the maximum which the landlord could possibly receive is the amount remaining, if any at all, after subtraction of that portion of the tenant's obligation to pay rent which is suspended by the landlord's breach. See Javins, supra, 428 F.2d at 1082-3.

This Court's decision of November 13, 1970, which conditioned its stay upon monthly security deposits by appellant at "reasonable occupancy value of the premises in 'as-is' condition," recognizes that Javins sets the standard. Cooks v. Fowler, No. 24,546 (D.C. Cir. Nov. 13, 1970) p. 12.[17/]

17/ Although in this case the lease was found to be void from its inception under Brown v. Southall Realty Corp., supra, the Court states that a Javins-type of calculation, starting with the monthly rental payment established by the lease is the fair rent for the premises in habitable condition. Cooks v. Fowler, D.C. Cir. No. 24,546 (Nov. 13, 1970), p. 10, as amended by supplemental order of January 12, 1971. A recent decision of the District of Columbia Court of Appeals has held that a tenant in these circumstances is a tenant at sufferance who must pay the landlord for the reasonable value of the premises. William J. Davis, Inc. v. Slade, D.C.C.A. No. 5329, slip opinion, December 3, 1970. Leave of this Court to appeal that decision has been sought. In any event it would appear proper that the provisions of the void lease agreement be considered some evidence of the fair rental value of the premises in conformance with the Housing Regulations.

The proper standard for protective prepayments under the Javins decision, is the diminished rental value of the nonconforming premises in their condition at the time of the stay, with due modification to take into account any changes in those conditions as they occur.[18/] The diminished value approach has been followed in a published opinion of the District Court of Essex County, New Jersey, Academy Spires, Inc. v. Brown, 111 N.J. Super 477, 268 A.2d 556 (1970), where the judge specifically found, on the basis of the testimony of the tenant and the landlord's superintendent, that a 25% diminution of rent was fair compensation, under the circumstances of that case, for the landlord's breach of the covenant of habitability implied into the lease agreement by law. Id. at 562. The Model Residential Landlord-Tenant Code (Tent. Draft 1969) American Bar Foundation, provides for a percentage abatement in rent to compensate for the reduction in a tenant's use of his property because of the landlord's failure to maintain the premises in habitable condition. See, e.g., id. §§ 2-207(1)(b) and (2)(b) for the recommended amounts of abatement under certain circumstances.

18/ Javins discussed pretrial protective orders. In the circumstances of this case, the diminished rent is the proper standard for payments pending appeal, since there was a finding of substantial housing code violations below.

V. THE METHODS OF DETERMINING THE DIMINISHED VALUE OF THE PREMISES

The Javins decision provides that the finder of fact determine the diminished value of the premises. Appellant strongly urges this Court to adopt a standard of measurement of this diminished value which will permit the Javins opinion to fulfill the need which Javins sought to answer. In that case the Court recognized the extreme scarcity of rental housing--especially at lower and middle rental ranges--in Washington, and the imbalance of bargaining power between landlord and tenant which resulted from that scarcity and from various other historical and legal causes. 428 F.2d at 1079. The Javins court, in finding an implied warranty of habitability based upon substantial conformance with the housing regulations with the varied remedies for breach of contract available for breach of the warranty, attempted to make progress toward correcting that imbalance. It is of critical importance that the method of measuring damages under Javins not become a means of subverting Javins' intended effect.

> There is more than one purpose underlying the rules of law that provide for the giving of damages for breach of contract. One of the ends to be obtained is, without doubt, the keeping of the peace. The party injured by the breach has a sense of grievance.

> In the absence of a public remedy, he would do his best to redress his own wrong. This means private war, with all of the resulting harm that it entails to the interests of other people. A second purpose in the giving of damages, however, one that is equally as important as the first, is the prevention of similar harms in the future. The fact that damages must be paid tends directly to the prevention of breaches of contract. It makes, therefore, for the security of business transactions and helps to make possible the vast structure of credit, upon which so large a part of our modern prosperity depends. 19/

It would not serve society's interests in seeing justice done to require that damages under Javins be measured on the basis of a comparison of the agreed upon rental for the leased premises with their "fair market value" in "as-is" condition. The measurement of damages must assume, as the Javins court assumes, that the rental agreement establishes a market value for the given premises in conforming condition. 428 F.2d at 1079. 20/

19/ Corbin on Contracts (1951 ed.) § 1002 Compensatory Damages.

20/ In this Court's January 12, 1971 supplemental opinion, which set two-thirds of the rental provided in the lease agreement as the temporary amount the tenant must pay under the protective order, one-third of the original rental is allocated to "shelter". This implies that any tenant in occupancy of premises must pay at least one-third of the agreed upon rental even if no "amenities" or services are provided. Although appellant understands that the court was attempting to make a fair temporary finding, appellant respectfully wishes

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When the jury has determined substantial breaches of the housing regulations, there can be no question that the tenant has suffered actual damages. The most practical and fairest way to measure the amount of the damages is to have it determined by the trier of fact on the basis of the testimony of the landlord and tenant concerning the condition of the premises. The experience of seeking a place to live and making a judgment concerning value of a given premises is a universal experience. Jurors and judges have all had to do this, at one or another level of housing comfort and luxury.

Under these circumstances, the courts should not admit, let alone seek, opinion evidence as to the amount of damages. 21/ The generally accepted rule of law concerning

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(footnote cont'd) to bring the attention of the court to the fact that this appears to place a floor of one-third of the rental as the minimum "as-is" value of occupied premises despite the Javins court's clear contemplation of the possibility that a tenant could continue his possession while the entire rent was abated.

21/ There are three additional problems inherent in the notion that expert testimony might be desirable, necessary, or tend to serve justice. First, it is questionable whether any "expert" can be found who is more knowledgeable than an ordinary person on the subject of illegal housing. Appellant doubts that it would be possible to find an expert qualified to give opinion testimony on that subject. Second, requiring a tenant to pay an expert would have a chilling effect upon the likelihood of his seeking justice in the courts. Third,

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admissibility of opinion evidence can be found at 2 Jones on Evidence 1958 ed., § 403. It says that opinion evidence, of either experts or nonexperts, is ordinarily not admitted "on subjects which are within the common knowledge of men of ordinary education, experience and opportunities for observation . . .. [M]oreover . . . special skill will not entitle a witness to give an expert opinion if the subject is one . . . where the jury is capable of forming its own conclusion from facts which are susceptible of proof in common form."

To require the jury to base its finding of damages on expert testimony on the "fair market value" of the premises would emasculate the substantive holding of Javins and render the decision meaningless. For if the test of a tenant's "damages" is the difference between the price set under the lease or occupancy agreement and the rent which the apartment would bring on the market in its substandard condition, then a low-income tenant will

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(footnote cont'd) any person who might conceivably qualify as an expert witness would be a member of the general class of landlords and people who earn their living from real estate. This renders virtually negligible the likelihood of finding an impartial "expert."

rarely, if ever, be able to present a successful Javins defense, since even a run-down apartment has a substantial rental value on the prevailing low-income housing market.

The sad fact is that the so-called "market value" of most substandard housing is probably at least as high as the rent which the tenant defendant agreed to pay, and this is particularly true where, as here, the housing code violations have existed since the tenant first signed the lease. Indeed, this is precisely the problem which the court sought to mitigate in Javins, and it is thus irrational to suggest a market-value standard for damages which would so obviously undercut the purpose and rationale of the court's decision there.

In charging the finder of fact with the responsibility to determine "what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach [of warranty]," this Court thus clearly contemplated that the trier of fact be guided by some other standard in making this determination. This assumption is, of course, in accord with the well-known principle that "[t]he test of market value is at best but a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted

to if, for special reasons, it is not exact or otherwise not applicable." Illinois Central R. Co. v. Crail, 281 U.S. 57, 64-65 (1930).

One measure of damages which is well established as an alternative to the market value test in breach of warranty cases is the reasonable cost of repairing the goods in question so as to put them in the condition warranted. Thus in Discount Motor Sales, Inc. v. Shubrooks, 163 A.2d 818, 820 (DCCA 1960) the District of Columbia Court of Appeals held that "where by reasonable expenditures the goods may be made to conform to the warranty, the cost of such expenditures may be the measure of damages." See also Talley v. Campbell Music Co., 219 A.2d 852 (DCCA 1966); Meyers v. Antone, 227 A.2d 56 (DCCA 1967).

However, while the cost of repair test may be appropriate under certain circumstances in cases involving the sale of goods, it appears to be far less appropriate to apply this standard to measure the decrease in value of an apartment caused by housing code violations. The obvious shortcoming of such a standard in the apartment rental context is the fact that the cost of repairing housing deficiencies does not necessarily bear any rational relationship to the value to the tenant of the facilities of which he has been deprived by virtue of such deficiencies.

It is conceivable, for example, that a heating system which has not worked properly for three months could be repaired for $25. Yet obviously such a sum would not begin to compensate the tenant, in accordance with Javins, for the three months that he was without adequate heat. Of course, since the "goods and services" which a tenant buys when he pays a month's rent are, essentially, the use of that apartment during said month, the cost of making the necessary repairs would have to be subtracted from the rent for each month during which the Code violations existed in the tenant's apartment. Even then, however, it is perfectly possible that the cost of repair would provide a measure of "damages" which would be clearly unfair to the tenant or, under some circumstances, to the landlord.

It is accordingly submitted that the "cost of repair" standard, while definitely preferable to the "market value" standard, is also an inappropriate way to measure the portion of the tenant's rental obligation which has been suspended, in accordance with Javins, as a result of the landlord's failure to maintain the premises in accordance with the housing code. Rather, it would appear obvious that the only appropriate way for the trier of fact to

measure the tenant's rental obligation under such circumstances is to be guided by the standard clearly implicit in Javins itself, namely, the extent to which the existing housing code violations affect the "habitability" of the tenant's apartment, i.e., the extent to which they affect the tenant's use and enjoyment of the apartment and make it less valuable to the tenant than it would have been without such violations.

While this standard does not, of course, provide the jury with a formula by which they can derive an exact damage figure with mathematical precision, the law does not require such certainty, and the standard implcit in Javins clearly provides a sufficient guideline to preclude a decision based on mere speculation or conjecture. As the Supreme Court pointed out in Eastman Co. v. Southern Photo Co., 273 U.S. 359, 379 (1927):

> Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate. This, we think, was a correct statement of the applicable rules of law. Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. Hetel v. Baltimore & Ohio R.R., 169 U.S. 26, 39. And see Lincoln v. Orthwein (C.C.A.), 120 Fed. 880, 886.

In Story Parchment Co. v. Paterson Co., 282 U.S. 555 (1931), the Court permitted a jury to determine the extent to which a company's profits were decreased by a conspiracy among its competitors to monopolize trade, despite the fact that there was no evidence to show what price level the company could have maintained absent the conspiracy and thus no precise standard for determining to what extent its profits suffered as a result of the conspiracy. In permitting the question of damages to go to the jury, the Court made the following pertinent statements:

> Nor can we accept the view of that court [the court below] that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based upon mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount . . ..

Application of a standard of habitability by the members of the jury clearly accords with the procedure approved by the Supreme Court in Story Parchment:

> Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit.

Id. at 564. See also McCormick, Damages (1935) § 27.

The jury's competence to apply this standard is also supported by the principle, well-established in this jurisdiction, that "where the trier of fact is just as competent to consider and weigh evidence as is an expert and is just as qualified to draw conclusions therefrom, it is improper to use opinion evidence." 22/ Since Javins

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22/ Lewis v. Firestone, 130 A.2d 317, 319 (D.C. 1957); Gerber v. Columbia Palace Corp., 183 A.2d 398 (D.C. 1962); Henkel v. Varner, 78 U.S. App. D.C. 197, 138 F.2d 934 (1943); Kenney v. Washington Properties, 76 U.S. App. D.C. 43, 128 F.2d 612 (1942); Waggaman v. Forstmann, 217 A.2d 310 (DCCA 1966); Washington Hospital Center v. Butler, 127 U.S. App. D.C. 379, 384 F.2d 331, 336 (1967).

pointed out that the urban tenant's leasehold right is essentially in the nature of a personal property right to a "package of goods and services" (428 F.2d at 1074), the jury's competence to assess the "damage" suffered by the tenant is further supported by the equally well-established rule that an owner of personal property is qualified to testify concerning its value to him.[23/] As the District of Columbia Municipal Court of Appeals pointed out in Manning v. Lamb, 89 A.2d 882, 884-885 (1952):

> The prevailing rule is that the owner of an article, whether or not he is generally familar with the value of like articles, may testify as to his estimate of the value of his own property. * * * Lack of general knowledge goes to the weight of the testimony and not to its competency. This rule has special application in cases of lost or destroyed household goods and wearing apparel where ordinarily the standard of market value is recognized as not furnishing adequate compensation and resort is had to the standard of actual value to the owner.

It is also now widely recognized that a suit for breach of warranty of merchantability is a hybrid action sounding both in tort and in contract, and the courts

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23/ See, e.g., Shea v. Fridley, 123 A.2d 358, 362 (D.C. 1956); Walsh v. Schafer, 61 A.2d 716, 719 (D.C. 1948); Glennon v. Travelers Indemnity Co., 91 A.2d 210 (D.C. 1952).

accordingly have not limited the assessment of damages in such cases to the strict standards applicable in contract cases but have permitted juries to assess consequential damages in accordance with tort principles. See, e.g., Williston On Contracts (3d ed.) § 1393 A. Since Javins drew heavily on the law regarding warranty of merchantability in imposing a warranty of habitability on landlords, the jury's competence to assess the amount of rent owed in accordance with the standard suggested above finds further support in the well-established tort law that damages for pain and suffering may be assessed in cases involving intentional torts and that the measure of damages in such circumstances is the degree of suffering which the "average person" would feel in the circumstances shown.[24/]

Finally, it should be noted that recent cases in this jurisdiction have permitted the trier of fact to assess the amount of "damages" under circumstances and on the basis of evidence similar to that which would be presented to the jury in a Javins case. Thus in Waggaman v. Forstmann, 217 A.2d 310 (DCCA 1966), a landlord sued a tenant for alleged damages in excess of normal

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24/ See Capital Traction Co. v. Morgan, 44 App. D.C. 237, 248 (1915); Clark v. Associated Retail Credit Men, 105 F.2d 62, 70 App. D.C. 183 (1939); 25 C.J.S. Damages § 64 (1966).

wear and tear to his apartment and furnishings resulting from the tenant's use of the premises. The jury entered a verdict for the landlord in the amount of $175, which the landlord challenged as inadequate on appeal, arguing that the trial court had "erred in refusing to permit three witnesses, whom they proffered as experts, to state their conclusions relating to wear and tear for guidance of the jury in reaching a verdict." 217 A.2d at 311. In rejecting this contention, the court of appeals pointed out that it is well established "that where the trier of fact is as competent as an expert to consider and weigh the evidence and to draw conclusions therefrom, it is improper to use expert testimony." Id. The court accordingly held that: "The question of the amount of damages was properly within the province of the jury and there was competent evidence upon which it could make its award of $175." Id. at 312.[25/]

25/ In three post-Javins trials in the Landlord & Tennant Branch, which consolidated a total of 62 disputes, the triers of fact found the damages suffered by the tenants due to the breach of the implied warranty of habitability on the basis of testimony concerning the conditions of the premises. South Potomac Realty Co. v. Adams, et.al., LT 90210-70, et.seq. (Dec. 22, 1970); John R. Pinkett, Inc. v. Lomax, et.al., LT 111726-69, et.seq. (June 5, 1970); Ruppert Real Estate, Inc. v. Clark, LT 24156-70 (Jan. 7, 1971). In these trials no expert testimony was required and the juries were given broad discretion in ascertaining the diminished value of the premises. To the best of appellant's counsel's knowledge the only other Javins-type case in which Javins issues have been raised is the instant case, where the judge refused to allow the jury to make a Javins determination.

In making his own findings of fact in what appears to be the first reported case determining the diminution of the value of the tenant's use of property by reason of the landlord's breach of an implied covenant of habitability, a New Jersey court followed exactly the approach suggested herein by appellant, and found:

> I am dubious that use of expert testimony could add to either accuracy or certainty. Certainly, if tenant were required to bear the cost of producing an expert witness, the effectiveness of the relief afforded . . . would be diminished. I therefore adopt the percentage abatement theory advocated by tenant. 26/

CONCLUSION

For the reasons set forth above, appellant requests this Court to remand this case to the trial court for the entry of an order which requires appellant to deposit into court monthly only the sum which truely represents the diminished value of her premises. In determining this value, expert opinion to testimony should not be permitted. The determination should be

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26/ Academy Spires, Inc. v. Brown, 111 N.J. Super, 477, 268 A.2d 556, 562 (1970).

made by the trier of fact on the basis of testimony concerning the condition of the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for Appellant were mailed, postage prepaid, to Herman Miller, Esq., Attorney for Appellee, 400 Fifth Street, N.W., Washington, D.C., 20001, this twenty-second day of January, 1971.

Caryl S. Cole

Caryl S. Cole

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

CEOLA COOKS

Appellant

v.

ROLAND A. FOWLER, T/a
J. EDWARD FOWLER & SON

Appellee

No. 24,546

APPEAL FROM THE DISTRICT OF
COLUMBIA COURT OF APPEALS

BRIEF FOR THE APPELLEE

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SUBJECT INDEX

	Page No.
Statement of Issue Presented	1
Summary of Argument	1
Argument	1, 2 and 3
Conclusion	3
Certificate of Service	3

STATEMENT OF ISSUE PRESENTED

We believe that in view of the fact that the jury, in the trial court in the second case, L&T 51880 - 70 returned a verdict upon which judgment was entered in favor of the appellee for possession based upon a thirty days notice, the issue attempted to be presented by the appellant is actually moot in that since no appeal is sought from the judgment of possession, application for an appeal from that judgment is baseless and this appeal should be dismissed.

SUMMARY OF ARGUMENT

The purpose of a supercedeas bond and/or an order requiring the appellant to pay rent into the Registry of the Court was for the purpose of acting as a supercedeas or stay bond. If the merits of the appeal are not contested there is no purpose in the appeal and for this reason the appeal hearing should be dismissed.

A R G U M E N T

The second case was an issue as to whether or not that case based upon the service of a thirty days notice for possession was retaliatory because it was claimed that the appellant had made complaints to the housing authorities because of the condition of the premises.

The issue of retaliation was submitted to the jury and it returned its finding against the appellant upon which the judgment was based.

Apparently, that judgment is not being appealed only the claim that the courts conditioning the stay upon requiring the appellant to pay rent into the Registry of the Court is being appealed.

What relevancy or purpose would be accomplished to hold a hearing to determine the appropriate conditions of a stay and permit both parties to offer evidence to stay a judgment from which an appeal is not requested?

If no appeal is requested on the main judgment, that judgment stands and the appellant would not be entitled to a stay, this kind of a claim is ludicrous.

If this case is sent back to determine what amount should be paid into the Registry of the Court, then what happens to the judgment for possession? It is not being appealed. That judgment entitles the appellee to possession and the appellee cannot understand what is to be accomplished by such a hearing.

The order in this case is not a pre-judgment protective order but in the nature of a supercedeas bond after entry of judgment.

After the affirmance, if there is to be one (and the appellant now has obtained the benefit of an extension on a judgment which she actually is not appealing from) it would be necessary to return the case to the trial court to determine the amount of damages under the order.

This court has quite clearly held, and rightfully so, that there is no actual difference in the determination of the rent of a peice of property in which there are housing violations whether the agreement is void at the inception or the violations arose after the tenancy commenced for in both cases the tenant continues to occupy and still becomes a question of what the rental value "as is" may be.

The matters to be determined as raised by the appellant in this case are properly determinable when the matter comes up to determine what amount, if any, the landlord is entitled for the tenant's use and occupancy. The argument now made in the appellant's appeal is premature.

For these reasons we request the court to dismiss this appeal and permit the appellee to have her possession which the jury gave her and defer the question of the amount to a hearing under the claim for damages under the stay order which required the appellant to deposit funds into the Registry of the Court.

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CERTIFICATE OF SERVICE

Copy mailed to Mr. C. Christopher Brown, 416 - 5th Street, N. W., Attorney for Appellant, by U. S. Mail, postage prepaid, this 17th day of February, 1971.

Herman Miller